(3)

Supreme Court, U.S.
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No. 87-1224

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF CALIFORNIA IMPOSING DISCIPLINE UPON AN ATTORNEY AS RECOMMENDED BY THE REVIEW DEPARTMENT OF THE STATE BAR OF CALIFORNIA

JOINT APPENDIX

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Jurisdictional Statement filed January 22, 1988
Probable Jurisdiction noted June 30, 1988

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JOINT APPENDIX

TABLE OF CONTENTS

Minutes of Review Department Recommending Mark Oring be Publicly Reproved	See, Jurisdictional Statement, Appendix "A"
Hearing Panel's Decision Finding No Culpability Because Rule and Standard Are Unconstitutional	See, Jurisdictional Statement, Appendix "B"
California Supreme Court's Denial of Petition for Writ of Review	See, Jurisdictional Statement, Appendix "C"
Stipulation as to Facts And Discipline	See, Jurisdictional Statement, Appendix "D"
Stipulation Re: Filing and Force or Effect of "Stipulation as to Facts and Disposition, etc."	See, Jurisdictional Statement, Appendix "E"
Review Department Minutes Recommending David Grey Be Publicly Reproved	See, Jurisdicitonal Statement, Appendix "F"
Notice of Appeal to the Supreme Court of the United States of America	See, Jurisdictional Statement, Appendix "G"

Decision of Local Administrative Committee — Appendix A herein Page 1

Excerpts of Transcript of Hearing Panel Hearing held December 5, 1984 — Appendix B herein Page 2

Proposed California State Bar Rules re: Lawyer Advertising — Appendix C herein Page 8

Excerpts of California State Bar Report to California Supreme Court re: proposed rules set forth in Appendix C — Appendix D herein Page 12

Notification by State Bar Review Department — Appendix E herein Page 18

APPENDIX A

1/11/83

LA 82-183

Decision of Local Administrative Committee

This matter was heard at a preliminary hearing held on 11/10/82. Resp's and Mr. Rochford, their counsel were present as was Ms. Pansky of the State Bar. The matter was taken under submission at that time.

The Committee has again reviewed the file and conducted its own research into the matter.

Although the Committee believes that the advertisement is a "testimonial" as that phrase is used in Rule 2-101(D), the Committee finds that there are not sufficient facts to warrant further proceedings. The creation of the presumption set forth in the foot note to Rule 2-101(D) does not meet the constitutional requirements as they have developed in this area. See *Speiser v. Randall,* 357 U.S. 513 (1958) and *Matter of R.M.J.* ___ U.S. ___ (1982) There was no evidence produced by the State Bar that suggested that the advertisement was in fact misleading.

State Bar to give notice of this decision.

/s/ JEROME H. CRAIG

APPENDIX B

STATE BAR COURT
OF THE STATE BAR OF CALIFORNIA
DISTRICT 7

IN THE MATTER OF DAVID A. GREY, MARK ORING, MEMBERS OF THE STATE BAR.	)))))))	No. 84-0-131 LA (LA 3841)

REPORTER'S TRANSCRIPT
December 5, 1984
Los Angeles, California

Hearing Panel:	LOYD REED, Principal Referee JAMES L. KELLNER, Referee BARRY J. POST, Referee
State Bar Examiners:	ERICA TABACHNICK R. GERALD MARKLE
Counsel for Respondent Grey:	STEVEN J. RUBEN AND LORI TOYAMA
Counsel for Respondent Oring:	THEODORD (sic) A. COHEN
Also Present:	RESPONDENT GREY

Reported by:
Katherine P. Hall, CSR 4487,
RPR and Notary Public

Hutchings No. LA 6298-84

EXHIBITS

DESCRIPTION	FOR IDENTIFICATION	IN EVIDENCE
Joint Exhibit 1	4	
Joint Exhibit 2	5	5

(p.2) LOS ANGELES, CALIFORNIA, WEDNESDAY, DECEMBER 5, 1985, 6:37 P.M.

REFEREE REED: This is the case in the matter of David Grey and Mark Oring.

Is the State Bar ready?

MS. TABACHNICK: Yes, we are.

REFEREE REED: Are the respondents ready?

MR. RUBEN: We are, for Grey.

REFEREE REED: As I understand, Mr. Cohen, on behalf of your client Mr. Oring, there's a little different procedure.

MR. COHEN: Slightly.

REFEREE REED: Could you tell us what that is?

MR. COHEN: We have worked out an arrangement with the State Bar and have entered into a stipulation as to facts and disposition pursuant to Rule 407 of the Rules of Procedure of the State Bar as to Respondent Oring.

I might state that Mr. Oring is not present. The State Bar is aware of the fact that he would not be here this evening and did not require his presence.

But going back to this stipulation, we have entered into a stipulation which has been signed by Counsel for State Bar, by myself, and by Respondent Mark Oring, the nature of which we would like to lodge, not file.

REFEREE REED: All right.

MR. COHEN: The reason being that that stipulation will not take effect unless and until there is a finding of culpability made and upheld through appeals and reviews as to (p.3) Respondent Grey, it being the intent of the parties, I suppose – Hold it.

(There is a conference between Mr. Cohen, Ms. Tabachnick and Mr. Markle out of the hearing of the reporter.)

MR. MARKLE: I think the understanding of the parties at this point is that the stipulation that Mr. Cohen is talking about we would lodge with the Hearing Panel this evening. In the event that the Hearing Panel makes a finding of culpability, then it's the position of the parties, in particular the State Bar, Mr. Cohen, and Mr. Oring, that the stipulation that we would lodge tonight would then become effective as the parties' stipulated recommended disposition of this case, which the Hearing Panel obviously can approve or disapprove.

In the event that this Hearing Panel finds that there is no culpability, then it's the parties' understanding that the stipulation would have no force and effect whatsoever, and that whatever decision that the Hearing Panel reaches, if that decision included a finding of no culpability, that decision would apply to both Mr. Oring and Mr. Grey.

MR. COHEN: I might add also that if, through appeals or reviews at some point, the matter is dismissed or the Respondent Grey otherwise discharged, that then that stipulation also would not apply.

In other words, our intent is that whatever happens to Mr. Grey would happen to Mr. Oring.

REFEREE REED: The thing that troubles me a little bit: Let's assume a scenario where we decide that Mr. Grey is in (p.4) deep trouble, and then the stipulation comes into effect, and then it goes up, and the Review Department disagrees with us and the Supreme Court says we are wrong. What then?

MR. COHEN: All of this subject – and I think it's in the stipulation – that we understand that this is merely a recommendation to this committee. It is merely a recommendation to the review board, and we have no control over what this review board or this panel or what the Supreme Court will do.

REFEREE REED: But if we assume a scenario that this Hearing Panel decides that Mr. Grey is culpable, then this document will be filed, period.

MR. COHEN: Yes.

REFEREE REED: Period, no matter what else happens.

MR. COHEN: Yes, our understanding being that it would not be enforced.

For example, supposing – which this doesn't apply, but supposing there were a situation where it was a stipulated suspension of 30 days. What we are saying is

that that would not go into effect with respect to Mr. Oring any sooner than it would go into effect as to Mr. Grey.

REFEREE REED: Fine. On that representaion, we will accept the stipulation.

MR. MARKLE: I suggest that we submit the stipulation as Joint Exhibit Number 1 for identification.

REFEREE POST: It's already been marked.

REFEREE REED: Exhibit Number 1, did you say?

MR. MARKLE: Yes.

(p.5) REFEREE KELLNER: Marked into evidence as Exhibit Number 1.

REFEREE REED: Not in evidence.

REFEREE KELLNER: Marked for identification by both the State Bar and respondents.

REFEREE POST: By Mr. Oring.

REFEREE REED: Not Grey.

MR. COHEN: In other words, we will leave Mr. Grey and his able Counsel to litigate.

REFEREE REED: You want to go, right?

MR. COHEN: If I may be excused.

REFEREE REED: You may be excused, in light of the stipulation.

Now, is the State Bar ready to proceed in respect to Mr. Grey?

MS. TABACHNICK: Yes, we are.

Before I start, I would like to have marked for identification and also offer into evidence at this time the Stipulation as to Facts Pursuant to Rule 401 of the Rules of Procedure, which can be marked Joint Exhibit Number 2.

REFEREE REED: Is there any objection to its being received into evidence?

MR. RUBEN: No.

REFEREE REED: Joint Exhibit Number 2 is received and admitted into evidence.

MS. TABACHNICK: Thank you.

I am going to try to be brief with my argument. I think it was fully briefed.

* * *

APPENDIX C

RULE 1-400. *ADVERTISING AND SOLICITATION.*

(A) *For purposes of this rule,* "communication" *means any* message *or offer made by or on behalf of a member* concerning the availability for professional employment of a member or a *law* firm *directed to any former, present, or prospective client, including but not limited to the following:*

(1) *Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or*

(2) *Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or*

(3) *Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or*

(4) *Any unsolicited correspondence from a member or law firm directed to any person or entity.*

(B) *For purposes of this rule, "solicitation" means any communication concerning the availability for* professional employment *of a member or a law firm in which a significant motive is* for pecuniary gain *and which is initiated by or on behalf of such member or law firm and which is delivered in person or by telephone or directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.*

(C) *A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.*

(D) *A communication or a solicitation (as defined herein) shall not:*

(1) *Contain any untrue statement; or*

(2) *Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or*

(3) *Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or*

(4) *Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or*

(5) *Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct; or*

(6) *State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court.*

(E) *The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.*

(F) *A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.*

Standards:

Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective ___ as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A "communicatioin", except professional announcements, seeking professional employment primarily for pecuniary gain which is transmitted by mail or equivalent means which does not clearly identify itself as an advertisement. If transmitted in an envelope, the envelope shall be identified as an advertisement on the outside thereof.

(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation

which states or implies that a member has a relationship to any other member or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A "communication" which states or implies that a member or law firm is "of counsel" to another member or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.

(10) A "communication" which implies that the member or member's firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

APPENDIX D

* * *

7. Proposed Rule 1-400. Advertising and Solicitation. (Current Rule 2-101)

Paragraph (A) is intended to define the specific types of "communications" to be regulated by the rule. In addition to a generic definition very similar to that found in current rule 2-101(A), proposed paragraph (A) contains four specific categories of communication sought to be regulated.

Paragraph (B) defines soliciation as a communication concerning professional employment for pecuniary gain, made in person or by telephone, which is initiated by or on behalf of the lawyer or law firm. Paragraph (C) prohibits such communications unless the lawyer has a family or prior professional relationship with the potential client.

Current rule 2-101(B) also prohibits in person or telephone contracts with potential clients, but has no exception for those prospective clients who have a family or prior professional relationship with the attorney. The exception to the ban or in person and telephone contacts is proposed because the potential for overreaching feared with in person or telephone contacts is perceived to be greatly reduced when a family member or former client is involved.

Several comments were received (including comments from the Federal Trade Commission and the Los Angeles County Bar Association) advocating elimination of the ban on in person and telephone solicitation altogether. These comments argued that

the prohibition precludes the public from getting vital consumer information by those means. The retention of the absolute prohibition (with the exception noted above) is recommended because:

a) The United States Supreme Court recognized in *Ohralik v. Ohio State Bar Association* (1977) 436 U.S. 447 and *In Re R.M.J.* (1982) 455 U.S. 191 that these methods are inherently capable of abuse and may be totally prohibited consistent with the First Amendment.

b) The recent rejection of the certiorari petition in *Grey v. State Bar of California* (LA Bar Misc. 32152) petition for review by California Supreme Court denied July 15, 1986, certiorari denied 107 S.Ct. 885 (Jan. 1, 1987) suggests that the United States Supreme Court is, at least presently, willing to permit states to adopt a fairly strong pro-regulation standard in weighing the competing interests of attorneys and the public;

c) The proposed rule would permit consumer information to be provided by all forms of general advertising, including directed mail and mass media; and

d) From a practical enforcement standpoint, if the disciplinary criteria is limited to rule 1-400(D) in regard to in person or telephone solicitation, the harm to the consumer will already have been done. A ban is a "brightline" test that lawyers and disciplinary bodies can easily understand

and apply, while requiring a case-by-case determination will almost certainly encourage unscrupulous attorneys to quibble or split hairs, engaging in conduct that will affect the public adversely and yet be largely immune from reasonable regulation.

The regulation of solicitation of clients by mail found in current rule 2-101(B) has not been included in proposed rule 1-400. Mailed communications would be regulated by proposed "Standard" (5), in addition to the regulations in paragraph (D) on the content of communications, which would make such mailings presumptively violative of rule 1-400 unless the envelope bears an "advertising" notation to enable the recipient to distinguish such advertising from actual legal correspondence. The regulation of mailings found in current rule 2-101(B) has not been included because any risk of intrusion and overreaching with mailings can be greatly reduced by requiring an advertising notation on the envelope and because the constitutionality of regulation of mailings such as that found in current rule 2-101(B) is in doubt.

Paragraph (B) also includes in the definition of solicitation communications initiated by the member directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication. This express prohibition is new and is intended to prevent interference with an already existing attorney-client relationship. A client would not be prevented from seeking a "second-opinion" on their matter because

the proposed rule only prohibits contacts initiated by the attorney.

Paragraph (C) includes a new provision intended to clarify the inapplicability of the rule to contacts with present or former clients where such solicitations are in discharge of a member's continuing professional duties (e.g., alerting an estate planning client of a change in tax laws and offering to rewrite his or her will).

The restriction found in current rule 2-101(C) on situations in which someone other than the attorney does the soliciting for the attorney is not expressly included in the proposal because Business and Professions Code section 6150 et seq. already address the runner or capper aspect and proposed subdivisions (B) and (C) refer to communications initiated or made "by or on behalf of" the member or firm.

Paragraph (D) carries forward the regulations on the content of "communications" found in current rule 2-101(A).

Rule 1-400(E) carries forward the concept of rule 2-101(D) in which the Board of Governors may formulate and adopt standards as to what "communications" will be presumed to violate this rule.

Standard (1) amends slightly existing standard (1) to encompass any guarantee etc., about any representation of a client rather than limiting the presumption to guarantees etc., concerning legal action.

Standard (2) would continue the protection afforded by existing standard (2), which provides that communications which contain testimonials or endorsements violate the rule. However, this standard had been amended to provide that such a communication would not be *presumed* to violate the rule if a disclaimer such as that quoted in the standard were included in the communication. Of course, such a communication may violate the rule even if a disclaimer is included (e.g. a communication containing a testimonial which included false statements).

Current standard (3) provides that communications delivered in person or by telephone to a potential client in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment are presumed to violate this rule. Proposed standard (3) continues the presumption in current standard (3) and expands it to protect the particularly vulnerable client irrespective of the method of communication and to provide a nexus between the standard and the knowledge of the member.

Standard (4) is identical to existing standard (4), which provides that communications transmitted at the scene of an accident or at or en route to a hospital is presumed to violate this rule.

Standard (5) provides that certain mailed communications are presumed to violate the rule if not identified as advertisements on the envelope. (See *Leoni v. State Bar* (1985) 39 Cal.3d 609, 627.) This is because an

envelope bearing only the return address of a member or law firm without the advertisement disclaimer may cause the recipient to fear legal action. Mailings that have the disclaimer protect the recipient from having to discern the commercial intent through content alone.

Standards (6) through (8) were included to clarify areas of concern which are frequently raised with respect to firm or trade names, and the use of the term "of counsel."

Standard (9) is new and was added because multiple trade names may be misleading because each trade name used may imply to the public the existence of a separate and distinct entity.

Standard (10) is new and was added after a great deal of comment regarding the problems created by members advertising as lawyer referral services when in fact there is only one member taking all the cases.

Rule 1-400(F) has carried forward the requirement of retaining a copy of any "communication" or recording made pertaiing to the attorney from rule 2-101(E), but the time for retention of such copies has been extended from one to two years. This is consistent with the policy advocated by the American Bar Association in its Model Rule 7.2(b) and is better suited to serve the interest of the public and the State Bar in having a documentary basis for reviewing attorney conduct under this rule.

* * *

APPENDIX E

NOTIFICATION BY STATE BAR REVIEW DEPARTMENT

Presiding Referee of the State Bar Court
WILLIAM R. MACKEY
333 BUSH STREET,
SUITE 3400
SAN FRANCISCO, CA
94104-2878
TELEPHONE (415) 772-6000

THE STATE BAR
OF CALIFORNIA

July 7, 1987

Mark Howard Oring, Esq.
9401 Wilshire Boulevard
Suite 650
Beverly Hills, CA 90212

In re: 84-O-131 LA (LA 3841)

In the Matter
of Mark Howard
Oring

(State Bar Investigation)

Dear Mr. Oring:

On May 28, 1985, this office advised you that the above-numbered matter would come before the Review Department of the State Bar Court for review. At that time, we served upon you a copy of the Decision. Enclosed herewith is a certified copy of the Minutes of the Review Department meeting held on April 2 and 3, 1987 insofar as it relates to the above-entitled matter. As a result, the State Bar Court has ordered that you be publicly reproved.

Accordingly, pursuant to the provisions of Rule 615 of the Rules of Procedure of the State Bar, you are hereby publicly reproved by the State Bar.

An appropriate notation is being made in the public records of the State Bar of the State Bar Court's action. The fact that you have been publicly reproved and the records of the proceeding upon which the reproval is based are a matter of public record.

You may, if you so desire, seek Supreme Court review of the State Bar Court's action. I am enclosing copy of Sections 6083(b) and (c), Business and Professions Code and Rule 952(c) and (e), California Rules of Court. No further notice of the decision will be given you.

Very truly yours,

/s/ William R. Mackey
William R. Mackey
Presiding Referee

WRM:cg
Enclosures
cc: Theodore A. Cohen, Esq.
Erica Tabachnick, Attorney at Law

SUBSECTIONS (b) AND (c) OF SECTION 6083 BUSINESS AND PROFESSIONS CODE

Section 6083.

(a) . . . .[Relates to petition for review of recommendation for suspension or disbarment].

(b) A petition to review or to reverse or modify any decision reproving a member of the State Bar, or any action enrolling him as an inactive member pursuant to Section 6007 of this code or refusing to restore him to active membership, pursuant to such section may be filed with the Supreme Court by the member within 60 days after service upon him of notice of such decision or action.

(c) Upon such review the burden is upon the petitioner to show wherein the decision or action is erroneous or unlawful.

RULE 952, CALIFORNIA RULES OF COURT

Rule 952.

(a) [Review of recommendation of disbarment or suspension].

(b) [Review of State Bar recommendation to set aside stay of suspension].

(c) [Review of other decisions) A petition to the Supreme Court to review any other action of the Board of Governors of The State Bar, or of any board or committee appointed by it and authorized to make a determination pursuant to the provisions of the State Bar Act, shall be filed within 60 days after written notice of the action complained of is mailed, postage prepaid, to the petitioner, addressed to him at his last known address appearing on the records of The State Bar. The petition shall be verified, shall specify the grounds relied on and shall be accompanied by the petitioner's brief and proof of service on The State Bar of three copies of the petition and the brief. Within 10 days after service of the petition,

The State Bar may serve and file an answer and brief. Within 5 days after service of the answer the petitioner may serve and file a reply. If a review is ordered by the Supreme Court, The State Bar, within 45 days after the filing of the order, may serve and file a supplemental brief. Within 15 days after service of such brief the petitioner may file a reply brief, of which three copies shall have been served on The State Bar.

(d) [Application for readmission or reinstatement].

(e) [Service on State Bar] Any petition or other matter to be served on or filed with The State Bar under this rule shall be served on or filed with The State Bar at its San Francisco office.